IN THE

Supreme Court of the United States

No. [redacted] 69-4

JOSEPH ARTHUR ZICARELLI,
Appellant,

v.

NEW JERSEY STATE COMMISSION OF INVESTIGATION,
Appellee.

On Appeal From the Supreme Court of the State of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

NEW JERSEY STATE COMMISSION OF INVESTIGATION,
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MOTION TO DISMISS

Pursuant to Rule 16(b) of this Court, Appellee, the New Jersey State Commission of Investigation (hereinafter, "the Commission"), moves to dismiss this appeal on the ground that it does not present a substantial federal question.

Statement

The Commission respectfully directs this Court's attention to the following facts which supplement Appellant Zicarelli's statement:

Appellant Zicarelli filed a suit in July, 1969, in the United States District Court for the District of New Jersey, against the Commission. His complaint in that case explicitly raised the identical issues as are raised in Points 1, 2, 3 and 4 of his Jurisdictional Statement in the instant case. He demanded that the Commission be declared unconstitutional pursuant to the provisions of the Federal Declaratory Judgment Act, that the Immunity Provision in particular be adjudged unconstitutional, that an injunction issue restraining the enforcement or invoking of the Immunity Provision and that a three-judge court be convened to hear and determine the cause. On July 19, 1969, Chief Judge William H. Hastie of the Third Circuit Court of Appeals filed a memorandum and order denying the convening of a statutory court, finding "in the present formal challenges to the constitutionality of the New Jersey statute no such substantiality as would warrant convening statutory courts" (R1a-R3a).* Subsequently, Appellant Zicarelli moved for summary judgment before the Honorable James A. Coolahan, U.S.D.C. On July 29, 1969, Judge Coolahan rendered an opinion upholding the constitutionality of the entire statutory scheme creating the Commission and further upholding specifically the constitutionality of the Immunity Provision. He granted summary judgment to the Commission and dismissed the complaint (R4a-R15a). Appellant Zicarelli filed a Notice of Appeal to the Third Circuit Court of Appeals, but subsequently withdrew this appeal (R16a).

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* References are to the page numbers in the Commission's Appendix filed with the Supreme Court of New Jersey, which has been certified to this Court as a part of the record below.

ARGUMENT

The appellant has not presented a substantial constitutional issue entitling him to appeal.

1. The Fifth Amendment of the United States Constitution, as it pertains to Appellant's argument relating to self-incrimination, provides simply that no person ". . . shall be compelled in any criminal case to be a witness against himself . . ." In complete harmony with the Amendment, N.J.S.A. 52:9M-17(b) (the immunity section of the statute creating the Commission) prohibits the use of a witness's testimony or evidence gained therefrom after immunity has been properly conferred upon that witness. The statute relates in pertinent part that such a witness ". . . shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate." Appellant claims that such a grant of immunity is insufficient to supplant the Fifth Amendment privilege and that *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892) purportedly requires an "absolute immunity against further prosecution" notwithstanding an independent source of evidence for that prosecution, thereby rendering the New Jersey Act constitutionally deficient. It is submitted that the grant of immunity under N.J.S.A. 52:9M-17(b) is in complete accord with the privilege and with the decisions of this Court and, therefore, fails to present a substantial question which this Court should consider.

Significantly, in a prior federal action by this Appellant, attacking the constitutionality of the Commission's immunity provision, Chief Judge Hastie of the Third Circuit Court of Appeals specifically found the challenge not

even substantial enough to warrant the convening of a three-judge court (R1a-R3a).

The decisions of this Court relating to the Fifth Amendment privilege and the immunity question may be synthesized into one overriding precept: that a grant of immunity must be co-extensive with the privilege against self-incrimination which it seeks to displace. This maxim has remained in substance since its reiteration in *Counselman, supra.* However, that there is a permissible latitude extant between the so-called "absolute" form of immunity from *any future prosecution* recited as a gratuitous overage in *Counselman* at 586 and an overly-attenuated immunity which is not co-extensive with the displaced privilege, is evident and at least tacitly acknowledged by this Court. Thus, the sufficiency of a prohibition against the *use* of a witness's testimony or evidence derived therefrom is indicated in the concurring opinion of Mr. Justice White in *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52 (1964) at 107:

> "Immunity must be as broad as but not *harmfully and wastefully broader* than the privilege against self-incrimination." (Emphasis added.)

Moreover, in writing for the majority in *Murphy,* Mr. Justice Goldberg stated that:

> ". . . we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate

> the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U. S. at 79.

If "absolute" immunity is the extreme, then the prohibition against the *use* of compelled testimony and evidence is the logical derivative reference of Justices White and Goldberg.

It is evident from the reported opinions that this Court has found no grave difficulty in reconciling the so-called "testimonial" immunity statutes, prohibiting the use of compelled testimony or evidence derived therefrom, with the Fifth Amendment, despite the 78 year old *Counselman* decision. In *Gardner* v. *Broderick*, 392 U. S. 273 (1968), Mr. Justice Fortas, citing *Counselman*, stated, in the clearest of terms at p. 276 that:

> "Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

Gardner, supra, is silent as to any "absolute" bar to future prosecution. See also *Ullman* v. *United States*, 350 U. S. 442 at 506 (1956). Inasmuch as a prohibition against use of compelled testimony and its "fruits" obvi-

ously comports with the requirements of the Fifth Amendment, it is submitted that the question is not substantial and should not be considered by this Court.

2. Appellant Zicarelli urges that a substantial question is raised due to the fact that a "responsive" answer is required as a pre-condition to the grant of immunity, thereby imposing an unconstitutional qualification thereon. In the first instance, such a claim is clearly premature. The fact that a court may ultimately have to determine whether or not an answer is responsive does not render a statute compelling such an answer unconstitutional. Analogously, a similar determination must often be made with respect to the "pertinency" of questions. Cf. *Morss* v. *Forbes,* 24 N. J. 341 at 352-353 and 356-357 (1957).

Furthermore, as a common sense proposition, it is apparent that a witness could not claim, nor would he receive or require, immunity from a nonsensical or absurd answer. In any event, notwithstanding the inclusion or elimination of the word "responsive" from the statute in question, similar legal questions would arise which would require some subsequent judicial determination for final resolution. Such *in futura* questions are insubstantial and should not be considered by this Court. Again, Appellant explicitly raised this issue in his federal action in July, 1969, and Chief Judge Hastie found that it lacked the requisite substantiality for even convening a three-judge court (R1a-R3a).

3. Appellant Zicarelli has been characterized by his own counsel as an "internationalist in crime" (see Jurisdictional Statement of Appellant, p. 8). By virtue of this appellation, he suggests that no immunity granted by the State of New Jersey would rise to sufficient height to accord him his constitutional protections. The Court

below at page 21 found the danger of prosecution "too imaginary and unsubstantial to sustain a refusal to answer".

It is respectfully submitted that Appellant must go much further in demonstrating a "real danger of prosecution in a foreign country" as described in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 at 67 (1964), than merely being labeled an "internationalist in crime" by his counsel to invoke the consideration of this Court. "The privilege protects against real dangers, not remote and speculative possibilities." *Murphy, supra*, at 102. See also *Brown* v. *Walker*, 161 U. S. 591 at 599-600 (1896). Accordingly, it is respectfully suggested that no substantial constitutional question is raised by the fact that Appellant may be considered by some as an "internationalist in crime".

4. Appellant attempts to equate the Commission and the statute creating it with the Louisiana Commission in *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). His claim of unconstitutionality based on this comparison is not substantial enough to require plenary argument.

Firstly, this Court did not hold that the Louisiana Commission's procedures were unconstitutional in *Jenkins*. It was held only that there was enough latent in the complaint that the case should proceed to trial. This holding was based on the requirement in the Louisiana statute that there be a determination in public findings whether there is probable cause to believe violations of criminal law have occurred, which public findings could include conclusions as to specific individuals. It was felt by the plurality that there was enough to warrant a hearing on the allegations in the complaint. The plurality further stressed that the Louisiana Commission had no role whatever in the Legislative process.

The infirmities in the Louisiana Commission and its procedures are conspicuously absent with respect to the Commission in the case at bar. N.J.S.A. 52:9M-3 and N.J.S.A. 52:9M-10 make the role of the Commission in the Legislative process clear. The directive in the statute in *Jenkins* that the Louisiana Commission name individuals guilty of specific crimes cannot be found even by inference in the New Jersey statute. Further, Appellant Zicarelli *was* given an opportunity to prove at trial that the Commission is designed to and does act in an accusatory manner and that its procedures fail to meet the requirements of due process. It was specifically found that the role of the Commission is *not* accusatory, that the rights accorded an individual are appropriate and adequate in the light of the Commission's mission and powers, that nothing had occurred in the instant matter which suggested that the Commission intends to transgress basic constitutional limits and that there has not been even a trace of a purpose to deny due process (see Opinion below, pages 5-8).

The New Jersey Supreme Court's construction of the statute creating the Commission, with respect to its legislative mission and its purpose "to find facts which may subsequently be used as the basis for legislative and executive action" (see Opinion below, page 5), which construction resulted from a review of the statute, must be accepted. *Kingsley Int. Pic. Corp.* v. *Regents of N.Y.U.*, 360 U. S. 684 (1959).

Those provisions of the statute in the instant case on which Appellant relies in an effort to show that the Commission is accusatory fall far short of that goal. The mandates in N.J.S.A. 52:9M-5, 52:9M-6 and 52:9M-7 to assist law enforcement officials, to cooperate with the United States Government in its investigations in New

Jersey and to consult and exchange information with other states with respect to law enforcement, in no way detract from the Commission's investigatory character. The directive in N.J.S.A. 52:9M-8 to refer evidence of crime to a proper prosecutive authority is no more than the obligation of any citizen (the referral obviously cannot be done publicly). As the New Jersey Supreme Court said at page 8 of its opinion: "That the Commission may also aid law enforcement by gathering evidence of crime and transmitting it to the appropriate agency for evaluation or prosecution does not militate against the power of the Legislature to seek the facts for its own purposes through such a Commission". The wiretapping authority under a different statute (2A:156A-8), with attendant judicial safeguards, is merely an additional method for acquiring knowledge. Appellant's allusion to the fact that counsel to the Commission (and its Executive Director) are former Assistant United States Attorneys, in an effort to bolster his assertion that the Commission is prosecutorial, is not even worthy of response.

Finally, it is significant that ten judges (including the Chief Judge of the Third Circuit Court of Appeals, a United States District Court Judge, a New Jersey Superior Court Judge and seven New Jersey Supreme Court Justices) have reviewed the New Jersey statute specifically in light of the *Jenkins* case and have found the Commission to be investigatory rather than accusatory, and thus within the holding in *Hannah* v. *Larche*, 363 U. S. 420 (1960). It is respectfully urged that the decision below is so clearly correct as not to require plenary consideration by this Court.

5. Appellant's argument that a civil commitment is violative of the Eighth Amendment is specious. A coercive

imprisonment for civil contempt based upon refusal to answer questions is clearly valid. *Shillitani* v. *United States*, 384 U. S. 364 (1966). Obviously, a recalcitrant witness cannot be confined, under the language in *Shillitani*, beyond the life of the Commission (until December 31, 1974). There is no punishment involved whatsoever, let alone cruel and unusual, when a witness "carries the keys to prison in his own pocket." Appellant's inference that he will be steadfast in his refusal to answer and that his incarceration is thus tantamount to life imprisonment (at page 5 of his Jurisdictional Statement) is impertinent, even though it is not nearly as arrogantly dogmatic as his outright assertion in the New Jersey Supreme Court that he would never answer the questions (see page 74 of Appellant's brief in the Supreme Court of New Jersey, certified to this Court as a part of the record below).

If Appellant chooses to remain incarcerated rather than obeying the lawful command to answer, the only punishment is a self-imposed, masochistic one. As this Court said in *Shillitani*:

> "While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify." 384 U. S. at p. 370.

Since Appellant's release *is* conditioned upon his willingness to testify, the Eighth Amendment argument is frivolous.

6. Appellant's argument that inquiry into his associations or beliefs with respect to La Cosa Nostra is violative of his First Amendment right of freedom of association is not substantial enough to require plenary con-

sideration, in view of the obvious correct finding below that the questions asked relate to an allegedly massive criminal organization and that the interest of the State is manifest. The Court must balance the right of a citizen to political privacy and the right of the State to self-protection. *Sweezy* v. *New Hampshire,* 354 U. S. 234 at 266-267 (1957). This, of course, is not to imply that the Commission deems Appellant's attempt to equate questions concerning his association and/or activities in La Cosa Nostra with an invasion of political expression or freedom of association (or belief) anything less than arrogant and frivolous and hardly one of substance.

CONCLUSION

The Appellant has not properly raised any substantial federal constitutional question which warrants the further attention of this Court and, therefore, it is respectfully urged that this appeal be dismissed.

Respectfully submitted,

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OF INVESTIGATION,
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